NO. 2856

In the

United States
Circuit Court of Appeals

For the Ninth Circuit

VICTOR VON ARX
Plaintiff in Error,

vs.

W. A. SHAFER and JOHN HENSON,
Defendants in Error.

Brief of Plaintiff in Error

UPON WRIT OF ERROR TO THE DISTRICT COURT FOR ALASKA, DIVISION NUMBER ONE

J. H. COBB,
Attorney For Plaintiff in Error.

SEATTIE, PRINTER, JUNEAU

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STATEMENT OF THE CASE

Plaintiff in Error was plaintiff below, and defendants in Error were defendants, and will, for convenience be called plaintiff and defendants respectively.

W. A. Shafer was city marshal of Douglas, Alaska, and John Henson was city magistrate, on September 11th and 12th, 1914. On the 11th, Defendant Shafer, between whom and the plaintiff there was bad feeling, at about the hour of noon, went to a house owned by the plaintiff, in Douglas City, and attempted to enter. Shafer had no business of any kind there. Plaintiff asked him if he had any business there—"any paper" or other authority, and upon being answered in the negative, informed Shafer that he did not want him on his property, and that he could not enter the house. Shafer, however, attempted to force his way in. This resulted in a personal encounter between plaintiff and Shafer, with usual verbal combat on such occasions. Shafer appears to have gotten the worst of the encounter, and when bystanders pulled plaintiff off, Shafer drew and presented a pistol at plaintiff, pushed him with the muzzle of the pistol to the city jail, and locked him in. On the way to the

jail they passed the office of Defendant Henson, who was standing in the doorway. Plaintiff asked Shafer to take him at once before the City Magistrate, but he refused.

Shortly thereafter not later than 5 o'clock, John Feusi and Theodore Hunsaker went to Defendant Henson and asked for bail, and offered bail for plaintiff. They were known to the Defendant Henson to be men of property and qualified bondsmen. Henson was drunk and declined to accept bail. Plaintiff was kept in jail till 10 next day, without food, when he was taken before the magistrate, and he then asked the magistrate to await the arrival of his attorney at 11. He was returned to jail, and about one o'clock, for the first time a complaint was made against him by Defendant Shafer.

There was a sharp conflict in the evidence as to many of the details and even on crucial points in the case, but the above is a fair statement of the case made by the plaintiff.

At the conclusion of the plaintiff's case, the Court granted a motion for non-suit against Defendant Henson. (Trans. p. 48-49). To which plaintiff excepted. At the conclusion of the whole evidence the Court instructed a verdict for Defendant Shafer. (Trans. p. 104-5) to which the plaintiff excepted.

ASSIGNMENT OF ERRORS

I. The Court erred in granting the motion of the Defendant John Henson for a non-suit.

II. The Court erred in directing a verdict for the Defendant, W. A. Shafer.

(Trans. p. 106).

ARGUMENT

The Statutory law applicable to the case is as follows:

> "That a peace officer may, without a warrant, arrest a person—
>
> First: For a crime committed or attempted in his presence.
>
> Second: When the person arrested has committed a felony, though not in his presence.
>
> Third: When a felony has in fact been committed and he has reasonable cause for believing the person arrested to have committed it."

Comp. Laws of Alaska, Sec. 2399.

Here no felony had been committed; and no crime was committed or attempted in the presence of the officer by plaintiff. In fact the only criminal conduct of any one at the time of the arrest was that of Shafer himself.

> "That the defendant must in all cases be taken before the magistrate without delay."

Comp. Laws of Alaska, Sec. 2389.

Here there was a delay of at least 24 hours during which time plaintiff was confined in jail without food.

"That when the defendant is brought before a magistrate upon an arrest, either with or without warrant, on a charge of having committed a crime, the magistrate must immediately inform him of the charges against and of his right to the aid of counsel before any further proceedings are had."

Ib. Sec. 2408.

The next three sections provide for the giving of a reasonable time to secure counsel, if desired; that immediately after the appearance of counsel, or if none appear in a reasonable time, "the magistrate must proceed to examine the case"; and that the examination must be completed at one session, unless for good cause shown by affidavit, it be adjourned, and prohibits adjournments for more than one day unless by consent of the defendant.

It is apparent then that the law prohibits just what was done in this case, namely, arresting without warrant and confining the person so arrested in jail longer than reasonably necessary to take him before a magistrate for examination or trial.

"A failure to perform this duty imposes liability in false imprisonment for a trespass *ab initio*."

19 Cyc. p. 354.

Low vs. Evans, 16 Ind., 487.

Stewart vs. Feeley, 118 Ind. 524, 92 N. W. 670.

Brock vs. Stimson, 108 Mass. 520.

Harness vs. Steele, 159 Ind. 286, 64 N. E. 878.

Lager vs. Warren, 62 Oh. St. 500, 51 L. R. A. 193, and note on pp. 216-217.

In Brock vs. Stimson, there was arrest without warrant, and about one hour detention only, and release without taking before magistrate. A judgment for $300 was sustained, the opinion being written by Mr. Justice Gray, afterwards of the Supreme Court.

Low vs. Evans, is an instructive case. The defendant, a city marshal, arrested plaintiff for alleged drunkenness, and the Court not being in session that day, put him in jail intending to take him before the Court next day. Later plaintiff was released upon his promise to appear next day. Plaintiff did appear next day and plead guilty and paid a fine. It was held that defendant was liable because he did not take plaintiff before a magistrate. The Court said:

> "If the power exists in the ministerial officer, to arrest on view, it is subject to the statutes of the State and to general and known principles of law. By these, it would be the duty of the officer to take the prisoner forth-

with before a tribunal having jurisdiction and prefer a complaint against him. Prisons do not fly open in this country at every touch of a mere ministerial officer, however worthy the motive may be that operate upon him; much less should they be made his sole control if he was subject to act wantonly or from an improper motive."

In that case the Court exhonerated the officer from improper motives, but sustained the judgment against him. In this case the jury might well have found grossly improper motives.

In the case of Harness vs. Steel, the Court in speaking of the power of arrest without warrant, said:

"But the power of detaining the person so arrested, or restraining him of his liberty, in such a case is not a matter within the discretion of the officer making the arrest. He cannot legally hold the person arrested in custody for a longer period of time than is reasonably necessary, under all the circumstances of the case, to obtain a warrant or order for his further detention from some tribunal or officer authorized under the law to issue such a warrant or order. If the person arrested is detained or held by the officer for a longer period of time than is required, under the circumstances, without such warrant or authority,

he will have a cause of action for false imprisonment against the officer and all others by whom he has been unlawfully detained or held."

(Citing authorities).

"An officer arresting without a warrant cannot justify his action in holding or detaining the prisoner for an unreasonable time before obtaining a warrant upon the ground that such delay was necessary in order to investigate the case or procure evidence against the accused. A detention for such a purpose, if necessary, is properly within the jurisdiction of the justice of the peace or other judicial officer before whom he may be charged with committing the offense."

These authorities, we think, make it clear that there was a case—a strong case—made against Defendant Shafer.

Was Defendant Henson exempt? The exemptions for their official acts which the law extends to Judicial officers, applies to Justices of the Peace and City Magistrates only when they act within their jurisdiction and not when they are performing ministerial acts, or refuse to act where it is their plain duty to act.

We think that when Feusi and Hunsaker applied to Henson on behalf of plaintiff for bail on the afternoon of September 11th, the day of the

arrest, and Henson refused bail, thereby prolonging the illegal detention till the afternoon of the next day, he acted illegally and aided and abetted the illegal arrest and become a joint tortfeasor with Shafer.

19 Cyc. pp. 334-5.

We respectfully submit that the judgment should be reversed and a new trial granted.

J. H. COBB,

Attorney For Plaintiff in Error.